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Calendar No. 187

101ST CONGRESS *1st Session*	SENATE	REPORT 101-97

NEGOTIATED RULEMAKING ACT OF 1989

REPORT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 303

TO ESTABLISH A FRAMEWORK FOR THE CONDUCT OF NEGOTIATED RULEMAKING BY FEDERAL AGENCIES

AUGUST 1 (legislative day, JANUARY 3), 1989.—Ordered to be printed

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AUGUST 1 (legislative day, JANUARY 3), 1989.—Ordered to be printed

Mr. GLENN, from the Committee on Governmental Affairs, submitted the following

REPORT

[To accompany S. 303]

The Committee on Governmental Affairs, to which was referred the bill (S. 303) to establish a framework for the conduct of negotiated rulemaking by Federal agencies, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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I. PURPOSE

Negotiated rulemaking, sometimes known as regulatory negotiation or "reg neg," is a process by which an agency that has decided to develop a federal regulation invites the interests who will be affected by the rule to join the agency in forming an ad hoc committee to develop a consensus draft of the regulation. If the interests agree to participate and committee members are able to reach a consensus, the committee presents the draft rule to the agency and recommends its adoption. The agency then reviews the draft and uses it as the basis for publishing in the Federal Register a proposed rule for public comment pursuant to the Administrative Procedure Act.

The purpose of S. 303, the Negotiated Rulemaking Act of 1989, is to establish a statutory framework for conducting negotiated rulemaking in order to encourage federal agencies to use the process when it enhances conventional rulemaking procedures.

II. Background

A. Overview of Rulemaking

Today, more than 100 federal agencies issue regulations on all aspects of American life. The Federal Register publishes over 5,000 regulatory documents each year. Given the breadth and impact of these administrative rules, it is crucial that the regulatory process be made as efficient and effective as possible.

Federal rulemaking procedures have come under intense scrutiny and criticism during the last decade by academia, public interest groups, industry, the private sector and even federal agencies themselves. Critics express concern over the poor quality of the rules produced, the burdensome nature of the rulemaking process, the length of time it takes to promulgate rules, and the frequency of litigation that follows.

To appreciate the problem, a brief review of federal rulemaking is helpful. The purpose of agency rules and the role of agencies in the rulemaking process have changed over the years. In the 19th century, federal regulations were designed principally to implement detailed legislative directives, and agency discretion was explicitly limited. With the New Deal, the character of administrative law changed, and agencies ere frequently granted broad regulatory authority to fulfill general legislative directives. When agencies exercised this authority to issue new regulations on a variety of social and economic issues, their discretionary authority drew criticism as an encroachment on the legislative process and a violation of the doctrine of separation of powers. These and other criticisms and calls for regulatory reform led to Congress' unanimous passage, in 1946, of the Administrative Procedure Act (APA).

The APA streamlined rulemaking procedures while increasing agency accountability and public participation. Among other measures, the statute established an "informal rulemaking" process. In that procedure, which is the most widely used method of rulemaking today, an agency's staff drafts a regulation based on the advice of its won experts or after informally consulting with outside parties. The agency than publishes this draft as a "proposed rule" in the Federal Register and provides a period for public comment. After reviewing all comments received, the agency makes any revisions it considers reasonable and promulgates a "final rule."

This rulemaking procedure worked relatively well for some years. But, over time, Congress and the courts have imposed additional procedural requirements on agencies to ensure that federal rules are derived from accurate factual analyses and reasonable policy decisions. A key development has been the insistence on a formal "record" for rulemaking decisions. Parties have been accorded the right to submit materials to be included in the rulemaking record, and agencies have been required to explain their regulatory decisions with reference to the information contained in this record. Courts have held agencies "bound" by their rulemaking

record and have required them to justify their policy decisions in that context. An agency which cannot justify its decisions in light of the rulemaking record risks judicial interventio which may strike or alter the agency's rule.

The resulting "hybrid rulemaking" process, which has both formal and informal mechanisms, can be cumbersome. In some rulemaking instances, it may lead to adversarial relationships among the agencies and affected parties. For example, because agencies are constrained to base their actions on the information in the rulemaking record, interested parties may try to "skew the record" in their favor by taking extreme positions, withholding relevant information, and attacking the factual basis of opposing positions. There is also little opportunity for give-and-take among the agency and the affected parties due to the lack of accepted mechanisms to reflect these interactions in the rulemaking record. The result can be rules which are distorted or please no one, take a long time to promulgate, and are the subject of lengthy litigation.

B. THE NEGOTIATED RULEMAKING ALTERNATIVE

During the 1970's, several administrative law experts turned to dispute resolution techniques as one way to address the problems in federal rulemaking. Individuals such as Harvard Professor Richard B. Stewart and Labor Secretary John T. Dunlop suggested that agencies begin examining negotiation as a potential tool for agencies and affected parties to develop mutually agreeable regulations. In the early 1980's, the Administrative Conference of the United States (ACUS), a federal agency charged with improving administrative law and practice, commissioned a study on the use of negotiation in federal rulemaking. The resulting report, authored by Philip Harter, a Washington attorney, led to ACUS' formally endorsing the process in 1982, in ACUS Recommendation 82-4, Procedures for Negotiating Proposed Regulations, 1 CFR 305.82-4.

Since the issuance of that recommendation, three federal agencies have taken the lead in using negotiated rulemaking proceedings, the Department of Transportation (DOT), the Environmental Protection Agency (EPA), and the Department of Labor (DOL). Others, such as the Federal Trade Commission, Nuclear Regulatory Commission and Department of Education, have also tried the process.

In 1983, the Federal Aviation Agency (FAA), within DOT, was the first federal agency to use negotiated rulemaking to develop a rule. The matter at issue was a safety rule which, in essence, set maximum hours for pilots on flight duty. The rule had not been revised in approximately 30 years, despite major changes in airline equipment and operating practices and despite unclear provisions which had caused disputes and litigation over the years. The FAA had made several attempts to revise the rule through traditional rulemaking procedures, but each effort was met with objections and no final rule was promulgated.

The FAA decided it was time for a new approach. In May 1983, it published a notice in the Federal Register indicating its intent to establish an advisory committee to help it develop a revised flight duty rule through negotiations among interested parties. Among

the proposed committee members were representatives of the airlines, pilots, consumers and the FAA. The notice solicited comments on the rulemaking process, the issues that should be considered, the committee membership, and other matters. It stated further than the FAA would proceed to develop the rule on its own if the negotiation project failed to produce a consensus within a specified period.

In June 1983, FAA published a final notice establishing the negotiated rulemaking committee. The committee held 16 days of formal meetings and more than 30 days of informal meetings among subgroups. It included representatives of such affected interests as Alaskan bush pilots seeking recognition of their concerns in the rule. Although the committee did not reach consensus on an entire regulation, it dramatically narrowed the differences among the participants. In March 1984, the FAA published a proposed rule based upon the committee's deliberations. This rule included special provisions for Alaskan bush pilots. After public comments were reviewed, the FAA issued a final rule in July 1985, which has been widely regarded as a successful regulation.

EPA and DOL have experienced similar successes. From 1983 to 1987, EPA has conducted seven negotiated rulemakings on such diverse subjects as woodburning stoves, pesticides, and truck emissions. DOL, through its Occupational Health and Safety Administration (OSHA), has used negotiated rulemaking to develop worker exposure limits to benzene and MDA, known carcinogens. Both agencies are strong proponents of the process.

In December 1987, the Program Evaluation Division in EPA conducted a review of EPA's negotiated rulemaking experiences to determine how well the process had worked, how it compares with conventional rulemaking, and how EPA could improve its criteria for selecting rulemakings which would benefit from negotiation. The Division made seven major findings:

1. The Division found that the negotiated rulemaking process produced pragmatic rules, with better environmental results in some instances, than probably would have been produced through conventional rulemaking.

2. The Division found that the negotiations facilitated an exchange of information and understanding of disputed issues, and that EPA was the primary beneficiary of the information flow. It found that information exchanged about pragmatic, "real world" concerns was particularly helpful in fashioning effective regulations.

3. The Division found that developing proposed rules through negotiation "made final rulemaking easier and less costly."

4. The Division found that relationships developed during negotiations helped the same parties to work together constructively in other situations.

5. The Division found that negotiated rulemaking works well in some, but not all, rulemaking situations. It listed key criteria and noted that the process is a labor-intensive one for all participants, including agency officials. It observed that nonprofit groups were sometimes at a disadvantage, because they did not have in-house experts or the resources to hire experts needed to present their technical arguments.

6. The Division found that EPA had generally identified all interests that were significantly affected by a rule and had ensured that these interests were represented in the negotiations, though problems had also arisen and been resolved.

7. The Division found that the EPA had chosen the rulemakings to subject to negotiation according to its established criteria and the judgment of its program managers. In two cases, program managers requested negotiated rulemaking proceedings despite identified obstacles, because they believed the agency would benefit from the information and insight provided by the participants, even if no consensus were achieved.

These findings demonstrate that, in EPA's experience, negotiated rulemaking has proven to be a valuable rulemaking procedure when used in appropriate circumstances. The experience of other federal agencies that have used the process confirm its value as an alternative to conventional rulemaking.

As word of the negotiated rulemaking process has spread, Congress has begun to pass legislation which includes reg neg provisions on an ad hoc basis. For example, H.R. 5, the Elementary and Secondary School Improvement Act, now P.L. 100–297, requires the Secretary of Education to use negotiated rulemaking to develop some of the rules required by that statute. The Price-Anderson Amendments Act, H.R. 1414, now P.L. 100–408, requires the Nuclear Regulatory Commission to use reg neg to decide certain indemnification issues related to radiopharmaceuticals. H.R. 1414's provisions also employ a reg neg process that is different from what the originators of the concept intended, because the bill requires a "convenor," if it is decided that regulations are needed, to present draft rules to the agency, even if no consensus is reached on the draft. The Committee believes such ad hoc use of reg neg will lead to a confusing multiplicity of procedures with uneven results—an unfortunate situation which could and should be avoided by passage of a negotiated rulemaking statute.

C. CONGRESS' CONSIDERATION OF NEGOTIATED RULEMAKING

Congress began examining the potential for using negotiation in federal rulemaking in 1980, when the Select Committee on Small Business, under Senator Gaylord Nelson, and the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, under Senator Carl Levin, held a joint hearing on the issue. Despite favorable testimony and the introduction of bills endorsing negotiated rulemaking, Congress deferred enactment of legislation to permit agencies to experiment with the process and gain experience in its use.

In May 1988, the Senate Committee on Governmental Affairs, under Chairman John Glenn, took up the issue in a hearing on S. 1504, a bill introduced by Senator Carl Levin (the predecessor to S. 303) to endorse negotiated rulemaking and establish mechanisms encouraging agencies to try the process.

At the hearing, the Committee received oral and written testimony from a variety of witnesses including representatives of EPA and ACUS, agencies with reg neg experience; members of industry and environmental groups which have participated in the process;

an industry group which wants the Department of Health and Human Services to try reg neg for the first time; individuals who have overseen negotiated rulemaking as convenors or mediators; and professors of administrative law.

The witnesses generally praised the negotiated rulemaking process. The agencies testified that it produced more effective rules in less time, with less overall cost and less litigation. Industry representatives stressed that the process has led to rules which are easier for regulated industries to implement. There was general agreement that reg neg had proven itself to be not only a viable option, but an effective regulatory process when properly used. The witnesses also agreed that more federal agencies should try it since, to date, only a handful have used the process. Among those agencies which have never tried it are the Department of Health and Human Services, the Securities and Exchange Commission, the Internal Revenue Service and the Department of Defense. These and other agencies should be alerted to the process and urged to explore its possibilities.

The witnesses were unanimous on another point. They agreed that reg neg does not work in all rulemaking situations and that it should be used only in appropriate circumstances. When asked to describe those circumstances, the witnesses listed such factors as a rulemaking which affects only a small number of interests, involves multiple issues (multiple issues apparently provide more bargaining opportunities and thereby increase the chances for parties to reach a consensus agreement), involves individuals who are adequate representatives of the affected interests and are willing to bargain in good faith, involves a matter on which the agency is willing to use the group's consensus as the basis for a proposed rule, and concerns a matter for which the agency is willing to invest the resources needed to make the negotiation succeed. The witnesses further agreed that, because a key to success in negotiated rulemaking is the careful selection of the rule to be negotiated, agencies would be wise to consult with reg neg experts when deciding whether to use the process in a particular case.

All but one of the witnesses testified in support of the bill. ACUS, for example, testified that some agencies still doubt their authority to use reg neg and need a statute to resolve that issue. Several witnesses supported the bill because agencies are confused about how to reconcile negotiated rulemaking procedures with the APA and the Federal Advisory Committee Act. They testified that the bill would not only resolve this confusion, but ensure that these procedural issues are treated in a uniform way for all negotiated rulemakings. Witnesses also noted with approval the provisions designed to assist agencies that have never tried the process.

In addition to acknowledging the strengths of the bill and generally supporting its provisions, the hearing witnesses suggested a number of improvements. The thrust of these suggestions was to increase the flexibility of the Act's provisions. Negotiated rulemaking is a regulatory process which has succeeded in part because it is a voluntary process which can adapt itself to the exigencies of each rulemaking situation. Witnesses were concerned that these features of the process be preserved.

The one witness at the hearing who did not support enactment of S. 1504 explained that he believed there was no need to include a reg neg provision in the U.S. Code. He said agencies already have the authority to use the process, and he was concerned that the bill would end opportunities for further experimentation and would give agencies too much authority to control the proceedings rather than participate on a co-equal basis with the other committee members. He argued that negotiated rulemaking succeeds because it is a "fragile" process which depends upon the voluntary concurrence of all participants to proceed. He testified that the bill as introduced might damage that fragility.

In a subsequent report on the bill, the Committee concluded that this argument, while providing a thoughtful analysis, was counterbalanced by other concerns. First, while the Committee agreed that agencies already have the authority to use negotiated rulemaking, it also recognized that a number of agencies have expressed reluctance to try the process. An authorizing statute would remove any doubt agencies may have about their authority, and also would serve as Congress' endorsement of the process. The bill would further encourage agency use of the process by presenting key reg neg information in one, easily accessible statute, with the major procedural issues resolved. Currently, agencies that want to try the process must gather reg neg information from scattered sources, resolve perplexing procedural issues, and overcome a significant learning curve on their own. Legislation would significantly ease that burden by providing guidance and assistance in one central statute.

Second, while the Committee agreed that experimentation and innovation with the process should continue and that its voluntary, flexible nature should be preserved, it did not agree that the only or the best way to achieve these goals was to have no reg neg statute at all. To the contrary, the Committee determined that these goals could be furthered by legislation which encourages more agencies to try—and experiment with—the reg neg process and which creates a statutory framework that preserves reg neg's voluntary and flexible nature.

Accordingly, the Committee developed a substitute to S. 1504 as introduced, which addressed the concerns of the witnesses and which incorporated improvements suggested during and in reaction to the hearing. On June 27, 1988, the Governmental Affairs Committee, by a vote of 13–1, ordered S. 1504 reported to the full Senate. On September 30, 1988, the Senate passed the bill by unanimous consent and sent it to the House for consideration. The House Subcommittee on Administrative Law and Governmental Relations of the Committee on Judiciary held a hearing on the bill, but failed to take further action on it during the 100th Congress.

On January 31, 1989, Senator Levin re-introduced the bill as S. 303, the Negotiated Rulemaking Act of 1989. The cosponsors of the bill are Senators Cohen, Riegle, Grassley, DeConcini and Roth. The bill was referred to the Committee on Governmental Affairs. It differs from last year's bill in the following respects:

(1) *FACA provision.* S. 303 simplifies and strengthens the language requiring agencies that sponsor negotiated rulemaking committees to comply with the Federal Advisory Committee Act.

(2) *Codification.* It places the key provisions of the bill in Title 5 of the U.S. Code, in the chapter on administrative rulemaking. This technical change required the sections to be renumbered and, in some cases, reworded.

(3) *Judicial Review.* Language was added to the section on judicial review to make it clear that regulations which are the product or negotiated rulemaking procedures are to be accorded no greater deference by a court than regulations which are the product of other rulemaking procedures.

(4) *Federal Notice.* Language was also added to the section requiring agencies to publish a notice in the Federal Register of an intent to establish a negotiated rulemaking committee. A new paragraph (8) requires the notice to explain how a person may apply, or nominate another person, for membership on the committee.

Additional minor changes in the wording of certain provisions were made to clarify, but not change, their meaning.

On July 13, 1989, the Committee ordered the bill reported to the full Senate for consideration. It also approved an amendment which corrects typographical errors, makes minor wording changes, and makes it clear that the Federal Mediation and Conciliation Service has the authority to do what it has been doing for years—help other federal agencies conduct negotiated rulemakings. The bill passed the Committee on a unanimous voice vote.

III. Provisions of S. 303

The Negotiated Rulemaking Act of 1989 establishes a statutory framework for agencies to use reg neg proceedings where appropriate. It presents sufficient guidance and assistance on the matter to encourage agencies to try negotiated rulemaking, while preserving the flexibility and voluntary nature of the process that is the key to its success.

Section 1: Short Title

This section states the title of the bill.

Section 2: Findings

This section sets forth the findings of Congress on negotiated rulemaking. It states that federal regulation has increased dramatically and that current rulemaking procedures may encourage adversarial relationships and litigation among parties affected by the rules. The section states that there are benefits to be derived from negotiated rulemaking in which affected parties engage in face-to-face negotiations to reach agreement on a rule. These benefits include increasing the acceptability, substantive merit and timeliness of proposed rules.

The section notes that, while federal agencies already have the authority to engage in negotiated rulemaking and several have used it successfully, the process is not widely used in part because other agencies are unfamiliar with it or uncertain as to their authority to use it.

Section 3: Negotiated Rulemaking Procedure

This section establishes mechanisms to help agencies determine when to use negotiated rulemaking and how to proceed, to encourage agency use of the process, and to resolve issues of judicial review.

Paragraph (a) places the operative sections of the bill in Title 5, Chapter 5 of the U.S. Code, which is the chapter on administrative rulemaking, by creating a new Subchapter IV, composed of Sections 581 through 590, as follows.

SUBCHAPTER IV—NEGOTIATED RULEMAKING PROCEDURE

SECTION 581: PURPOSE

Section 581 states the purpose of the Act, which is "to establish a framework for the conduct of negotiated rulemaking . . . to encourage agencies to use the process when it enhances the informal rulemaking process."

The Act's primary purpose is to encourage agencies to use negotiated rulemaking, by providing guidance and assistance on how to conduct negotiated rulemaking proceedings. The section also contains two caveats. First, the section encourages use of reg neg only "when it enhances the informal rulemaking process." This is a recognition that negotiated rulemaking is not appropriate in every or even most rulemaking situations. Thus, the Act does not seek to replace conventional rulemaking procedures with the reg neg process, but to encourage use of reg neg where appropriate.

Second, one of the key strengths of negotiated rulemaking is its flexibility and adaptability to the exigencies of particular rulemakings. That strength could be destroyed with too many inflexible statutory rules. Thus, the section states that the Act's purpose is to establish a "framework" for the use of negotiated rulemaking. That means that the Act sets out basic rules for the process, rather than comprehensive or rigid requirements. In addition, the section states that nothing in the Act "should be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process or with other innovative rulemaking procedures otherwise authorized by law." The point is that the goal of the Act is to resolve certain, basic procedural issues on how to conduct a reg neg, while being careful not to stifle continued experimentation with that process and with other innovative rulemaking procedures.

SECTION 582: DEFINITIONS

Section 582 sets forth the definitions that apply to the Act.

Consensus. "Consensus" is defined to mean "unanimous concurrence among the interests represented on a negotiated rulemaking committee . . . unless such committee agrees to define the term to mean a general but not unanimous concurrence; or agrees upon another specified definition." This provision incorporates the flexibility that is crucial to a negotiated rulemaking statute: it provides general guidance on the concept of consensus, but also allows participants in particular rulemakings to alter the definition, if everyone agrees to do so. It is intended to allow participants to define

consensus for their entire negotiation or, if they choose, to use a specific definition for particular decisions within that negotiation, again, if everyone agrees.

The term "concurrence" is used in place of "agreement" because reg neg experts have indicted that, in many negotiated rulemakings where participants are willing to withhold objections to a decision, they will not go so far as to say they "agree" with that decision. These experts advised the Committee that, to retain the flexibility needed in negotiated rulemakings, "concurrence," rather than "agreement," should be the requirement.

To achieve a consensus, the definition requires the concurrence of all the "interests" represented on a committee. In most reg negs, there will be only one committee member for each interest. It is possible, however, that in some reg negs several members representing the same interest will sit on the same committee. In such a case, the definition requires the concurrence, not of each individual, but of each "interest" as a whole. The reason for this requirement is to ensure a balancing of all the viewpoints represented on the committee, without weighting any particular viewpoint by the number of individuals participating on behalf of that perspective.

The term "consensus" appears throughout the text of the bill to emphasize the voluntary nature of the negotiated rulemaking process. To move ahead, committee members must work together to resolve the procedural and substantive issues that arise. Agency personnel, of necessity, play a lead role in convening and structuring the negotiation, because the agency is ultimately responsible for issuing the rule. However, the bill intends to preserve the voluntary, *consensual* nature of negotiated rulemaking that is the key to its success.

Convenor. A "convenor" is defined to mean a "person who impartially assists an agency" in determining whether it is "feasible and appropriate" to try negotiated rulemaking in a particular case. As stated earlier, negotiated rulemaking is successful in only a limited number of situations. A key step for any agency is deciding whether to try it in a particular setting; a convenor can help the agency with that determination.

The definition requires the convenor to act in an impartial manner, so that the agency receives unbiased advice. The definition states that the convenor "assists" the agency, to emphasize that final decisionmaking on the matter rests with the agency head. The standard of "feasible and appropriate" is a flexible standard which permits the convenor to consider a wide range of factors and to weigh both practical and normative considerations. Subsequent sections in the bill describe the convenor's tasks with more specificity.

Facilitator. A "facilitator" is defined to mean a "person who impartially aids in the discussions and negotiations" among the participants in a negotiated rulemaking. The term "facilitator" is used in place of "mediator" to emphasize that the person filling this role has no independent decisionmaking authority, but is expected solely to smooth the interactions among the other participants in the rulemaking proceeding and lead them to consensus. The definition requires the facilitator to act in an unbiased manner during

the negotiations. Subsequent sections in the bill describe the facilitator's tasks with more specificity.

Interest. An "interest" is defined in the Act as one or more parties which "have a similar point of view or which are likely to be affected in a similar manner." The term is significant primarily because the Act requires negotiated rulemaking committees to represent the "interests" that will be significantly affected by the rule under negotiation. By combining similar parties under one referent, the definition allows agencies to appoint one representative on their behalf. That means, for example, if two industry groups who will be significantly affected by a rule have similar concerns about its provisions, each one is not entitled to its own representative—they are together entitled to one member on the committee. On the other hand, if the two groups have different viewpoints on the rule, they would not constitute the same "interest" and each would be entitled to its own representative.

There are obvious difficulties with determining which parties have "similar" viewpoints or will suffer "similar" consequences from a rule. This delicate task is intimately linked to determining the overall membership of a reg neg committee, a process critical to the success of any negotiated rulemaking. The intent of the definition is to help agencies limit the size of their committees by requiring similar parties to use the same representative. However, it is not the intent of this definition to justify the exclusion of interests who will be significantly affected by a rule or to force similarly situated parties to use a representative who is unacceptable to some of those parties. While a single party should not be able to veto a representative tht is acceptable to all other parties holding similar views, a party who is unhappy with the individual chosen to represent it may challenge the resulting rule with the litigation that reg neg is designed to avoid. The hard fact is, if an agency is unable to assemble a committee with a limited number of members who—in the opinion of the affected parties—are satisfactory representatives of their interests, negotiated rulemaking is probably not a viable option in that rulemaking situation and should not be tried.

Negotiated Rulemaking Committee. A "negotiated rulemaking committee" is an "advisory committee," as that term is defined in the Federal Advisory Committee Act. It is the key decisionmaking unit in the negotiated rulemaking process. The committee is composed of all the participants charged with trying to reach a consensus on a rule, and it is the establishment, operation and termination of this committee that is the central concern of the Act.

Other Terms. Other terms such as "agency," "party," "person," "rule" and "rulemaking" are used in the same way as in the APA.

Section 583: Making the Decision

Section 583 provides guidance for an agency deciding whether to use negotiated rulemaking in a particular case. It first sets a general standard: whether using the procedure would be "in the public interest." It then requires the agency head charged with making that determination to consider at least seven specific factors:

—whether there is a need for the rule;

—whether there are a "limited number of identifiable interests that will be significantly affected by the rule";

—whether there is a "reasonable likelihood" that a negotiated rulemaking committee could be convened with persons who can "adequately represent" the affected interests and who are "willing to negotiate in good faith to reach a consensus";
—whether there is a "reasonable likelihood" that a consensus could be reached within a fixed period of time;
—whether using negotiated rulemaking would not "unreasonably delay" issuance of a final rule;
—whether the agency has adequate resources and is willing to provide them to the negotiated rulemaking committee to assist its deliberations; and
—whether the agency, "to the maximum extent possible consistent with the legal obligations of the agency," will use the committee consensus "as the basis for" a proposed rule published in the Federal Register for public notice and comment.

These specific considerations are factors which reg neg experts indicate are crucial to deciding whether to use the process in a particular case. They provide a basic, rather than comprehensive, checklist of the key factors to be considered. As has been stated earlier, negotiated rulemaking is not appropriate in every or even most rulemaking situations. It requires the voluntary participation of all the interests who will be significantly affected by the rule and a strong agency commitment to the process. Unless there is a relatively small group of interests who can agree on representatives and are willing to negotiate in good faith on a rule for which the agency is willing to provide funds, technical assistance and logistical support, negotiated rulemaking is probably not a realistic alternative and the agency should select a different rulemaking procedure.

In addition to setting out key factors to consider, Section 583 authorizes agencies to employ convenors to help them decide whether to try negotiated rulemaking in a particular setting. Convenors can assist the agency by identifying the interests that will be significantly affected by a rule, by determining the issues of concern to those interests and, after speaking with the affected parties and agency officials, to determine whether the process is "feasible and appropriate." It is only through careful research and the exercise of informed judgment that determinations can be made on such delicate subjects as whether there are individuals who are acceptable representatives for all the affected interests, whether all the affected interests are willing to negotiate in good faith, whether these interests are likely to reach a consensus within a fixed period of time, whether the agency itself is willing to devote needed resources and use any consensus position as the basis for a proposed rule, and whether use of the process will not cause undue delay in the issuance of a final rule. Experts with experience in negotiated rulemaking can provide useful advice on these and other difficult issues, and the bill encourages agencies to make use of their services.

The section requires convenors to report any findings they make to the agency that hired them and also authorizes but does not require them to offer recommendations to the agency. The provision thus allows agencies to use their convenors simply to gather information or also to provide advice. In addition, an agency can ask a

convenor to ascertain the names of particular individuals who would be willing and "qualified" to serve as representatives of the affected interests on the negotiated rulemaking committee. The term, "qualified," is intended to be interpreted broadly here and to include such concepts as whether the individual would be acceptable to the affected interests as a representative, knowledgeable about the subject matter of the rulemaking, available to participate in the proceedings, and ready to negotiate in good faith with the other participants.

The section also states that, if the convenor prepares a written report or recommendations, those materials must be made available to the public upon request.

SECTION 584: PUBLIC NOTICE

Section 584 indicates how an agency which has tentatively decided to use negotiated rulemaking in a particular setting must make that decision known to the public.

Public notice is a key step, because it is crucial to a successful negotiation that all interests who will be significantly affected by a rule under consideration are represented in the process. Negotiated rulemakings which do not provide representation for all significantly affected interests risk the very problems of adversarial relationships and rulemaking litigation that the process is designed to avoid.

It is often difficult for an agency, even when working with a convenor, to identify all of the interests which will be significantly affected by a rule under consideration. For example, an agency working on a rule affecting the elderly might not realize that the rule affects low-income elderly differently from other sectors of the elderly population and that the low-income elderly should receive separate representation on the rulemaking committee. Agencies may also inadvertently overlook affected groups. It may not be apparent to an agency, for example, that a rule pertaining to an urban issue could also significantly affect rural communities. When the Federal Aviation Administration held a negotiation over a pilot flight duty rule, it included representation of Alaskan bush pilots, a group which could easily have been overlooked, and accommodated their special needs. Section 584's public notice requirement is designed to help ensure this result, the creation of negotiated rulemaking committees which include all significantly affected interests.

Section 584 provides that an agency which has decided to use negotiated rulemaking in a particular setting must publish a notice of that intention in the Federal Register. The notice must describe the rule to be developed, the issues to be considered and the interests which the agency believes are "likely to be significantly affected by the rule." By using the word "likely," the bill provides agencies with a measure of discretion in determining what interests should be included on a rulemaking committee. At the same time, the bill requires a listing of only those interests which the agency thinks will be "significantly affected" by the rule. This provision relieves agencies of the obligation to include on a committee every

interest which may be affected by a rule, no matter how remote or insignificant the affect on that interest may be.

Developing this list of interests is a difficult and crucial task in the negotiated rulemaking process. Committees which have too many members become unwieldy; committees which leave out key interests are treated with suspicion, and any consensus they reach may not enjoy the acceptability and substantive quality that is the aim of the negotiated rulemaking process. Special attention must be given to fair representation of low-income, minority and other disadvantaged groups by experienced and acknowledged representatives. In short, agencies are cautioned to exercise extreme care in developing this list to maximize the opportunities for a successful rulemaking negotiation.

In addition to describing the rule and the interests likely to be significantly affected, the Federal Register notice must identify by name the persons proposed to participate on the committee as representatives of the listed interests. The notice must also name the person or persons who will represent the agency. One function of this provision is to enable individuals in the public domain to contact the named persons to determine whether they will in fact represent their interests. In this regard, agencies may also wish to list the name of any convenor used to help evaluate and structure the negotiation.

Next, the notice must set out a "proposed agenda and schedule for completing the work of the committee, including a target date" for publishing a proposed rule in the Federal Register. This provision is a critical one, since reg neg experts agree that negotiated rulemaking works best when there is a deadline for action. The bill does not impose an inflexible deadline on committee deliberations, nor does it force agencies to impose such deadlines. The bill instead allows such scheduling decisions to be tailored to each rulemaking situation. However, the bill does encourage every agency to set at least a target, if not mandatory, date for a committee to finish its work as a technique to facilitate the process. This information also alerts the public to how long, in the agency's estimation, the process may take.

Next, the notice must include a description of the "administrative support" that the agency intends to provide to the committee. By "administrative support," the bill means the extent to which the agency will provide such items as a conference room for meetings, funds for participant expenses, and clerical assistance to perform such committee tasks as typing, sending meeting notices, resolving logistics problems, and distributing materials. The "technical assistance" that the agency intends to provide to the committee must be included in the description of expected administrative support. Many rulemakings require information on a wide range of complex issues including, for example, statistics, industrial capabilities, physical properties of chemicals, legal restrictions, computer capacities, and the health implications of particular procedures. The notice in the Federal Register should indicate the extent to which the agency is prepared to provide or procure needed assistance on such technical issues.

Reg neg experts have found that, on average, negotiated rulemaking proceedings incur higher initial expenses than convention-

al rulemaking proceedings, due to the cost associated with supporting a committee. They also agree that a rule developed through the negotiated rulemaking process is less likely to be litigated after its issuance, so that, overall, its costs may be lower than the costs of rules developed through conventional rulemaking. Agencies must recognize and be willing to incur the higher up-front costs of negotiated rulemaking to derive the benefits of the process. Section 594 requires agencies to consider the issue of administrative support when deciding whether to try negotiated rulemaking in the first place, and it is expected that agencies which do try the process will maximize the opportunities for success by providing the administrative support needed for the committee to develop an informed and effective rule.

Next, the Federal Register notice must include a solicitation of comments on its proposed use of negotiated rulemaking and the proposed membership of the negotiated rulemaking committee. Finally, the Federal Register notice must explain to the public how to apply or nominate another person for membership on the committee.

Subsection (b) of Section 584 provides additional information on the right of the public to suggest an additional person for membership on a rulemaking committee. In states that persons "who will be significantly affected" by a proposed rule and "who believe that their interest will not be adequately represented" by any of the individuals listed in the Federal Register, may apply themselves or may nominate another person to represent their interests on the committee.

To add a new participant to a negotiated rulemaking committee, the section requires certain information to be provided in writing to the agency. First, the person submitting the application or nomination must provide the name of the individual who is being proposed to join the committee and describe the interests that person would represent. Second, reasonable evidence must be provided that the named individual has been determined by the interests he or she would represent to be an acceptable nominee. For example, if an applicant or nominee is supposed to represent consumers, this requirement could be met by a letter from an established consumers group stating that the proposed individual would be an acceptable committee representative. The purpose of this requirement is to preclude the participation of individuals who are not acceptable to the interests they claim to represent.

Next, the applicant or nominee must provide a written statement that he or she will actively participate in the negotiation "in good faith" to develop a proposed rule. Finally, there must be an explanation of why the committee members identified in the Federal Register notice would not "adequately represent" the interests of the person submitting the application or nomination.

The information contained in any such application or nomination must be considered by the agency that intends to establish a negotiated rulemaking committee, as provided in the next section of the Act.

SECTION 585: ESTABLISHING A COMMITTEE

Section 585 provides basic rules for establishing a negotiated rulemaking committee.

After publishing the Federal Register notice of intent to establish the committee, as provided in Section 584, the agency must wait at least 30 calendar days for any comments, or applications or nominations for additional participants. All timely comments, applications and nominations received by the agency must be reviewed and considered.

After reviewing all timely comments, applications and nominations, the agency must make two determinations. First, it must determine whether a negotiated rulemaking committee can be formed with members who "can adequately represent" all the interests that "will be significantly affected" by the rule under consideration. The disposition of any applications or nominations for new committee members would, of course, be particularly relevant to this determination. Second, the agency must determine whether formation of a negotiated rulemaking committee would be "feasible and appropriate in the particular rulemaking." This determination must take into consideration all of the comments received from the public as well as the factors listed in Section 583, and should include careful consideration of any findings or recommendations made by a convenor. Together, these two determinations will enable the agency head to decide, as provided in Section 583, whether use of the negotiated rulemaking process in the particular case at hand would be "in the public interest." If it is, the agency head may establish a negotiated rulemaking committee.

On the other hand, if, after reviewing the comments, applications and nominations and making the determinations required by the Act, an agency decides not to try the negotiated rulemaking process, it must promptly publicize that decision in the Federal Register and generally explain why. By explaining the basis for a decision not to proceed, the agency will document the problems encountered and will provide, for the wider reg neg community, data on situations in which negotiated rulemaking appears not to be a viable option. It will also inform the affected interests about the identified difficulties, giving them an opportunity to try to resolve them and enable the agency to use the process at a later date.

For agencies that decide to establish a negotiated rulemaking committee, Section 585 explains how to do it. The section states first that, in establishing a negotiated rulemaking committee, the agency "shall comply" with the Federal Advisory Committee Act (FACA), "except as otherwise provided in the subchapter."

FACA imposes common sense controls on federal agencies which utilize advisory committees to ensure that these committees operate with fairness, openness and accountability. FACA requires, for example, that agencies form committees with memberships that are balanced in viewpoint and free of undue influences. It requires each committee to file a charter prior to beginning work, to keep records of its activities and finances, and to hold meetings which are open to the public unless certain exceptions apply.

FACA and S. 303's provisions were designed to be complementary. For example, FACA's requirement that advisory committees be

balanced in viewpoint dovetails with S. 303's requirement that negotiated rulemaking committees reflect all interests that will be significantly affected by the rule under consideration. The requirement in Section 9(a)(2) of FACA, that advisory committees established by agencies be a matter of formal record with notice in the Federal Register, is fulfilled by Section 584 of S. 303 which requires federal publication of an agency's intent to establish a negotiated rulemaking committee. Moreover, FACA supplies standard operating procedures for reg neg committees on such subjects as finances, recordkeeping, and the Government in Sunshine Act.

Section 585(b)(1) resolves a recurrent procedural question about the reg neg process by stating unequivocally that negotiated rulemaking committees are subject to FACA and must follow its strictures. It contains stronger language than earlier versions of the bill to remove all doubt about the Committee's intent that FACA be followed. The bill also omits language that appeared in earlier versions of the bill explaining how FACA was to be applied to negotiated rulemaking committees, due to complaints that this language could have been read as creating exceptions to rather than requiring compliance with FACA's rules. The point of both revisions is to make it clear that, in establishing negotiated rulemaking committees, federal agencies "shall comply" with FACA.

The bill requires compliance with FACA, because negotiated rulemaking committees are inherently advisory bodies, whose purpose is to make recommendations to federal agencies about proposed regulations. Those are precisely the type of committees FACA is designed to regulate. Almost all negotiated rulemaking committees have complied with FACA to date and have experienced little difficulty in doing so. At the same time, experience has indicated that negotiated rulemaking committees would benefit from two limited exceptions to FACA, which the bill contains: (a) it provides more flexible rules for terminating a negotiated rulemaking committee, as explained in relation to Section 587; and (b) it provides different rules for agency reimbursement of committee member expenses, as discussed in relation to Section 588. It is to accommodate these two exceptions that Section 585 requires agencies establishing negotiated rulemaking committees to comply with FACA, "except as otherwise provided in this subchapter."

After instructing agencies to establish their committees in accordance with FACA, Section 585 requires agencies to limit committee membership to 25 individuals "unless the agency head determines that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership." The purpose of this provision is to provide flexible guidance on the size of a committee. Experience has shown that committees with more than 25 members are usually too unwieldy to operate effectively, so the statute imposes a membership limit which agencies can waive, but only with good reason.

The section also makes it clear that every negotiated rulemaking committee must include "at least one individual representing the agency." During the Senate hearing on the bill, one witness expressed the fear that the Act would encourage agencies to abandon their policy-making responsibilities by providing a forum in which affected parties will be forced to "slug it out" on regulations with-

out agency involvement. That is not the purpose of this Act, and this provision emphasizes the Committee's intent that agencies play an active role in committee negotiations. Agencies should not be neutral or passive when rulemaking committees are conducting their deliberations; to the contrary, agency officials should inform the participants about the agency's missions and capabilities. This level of participation is essential to ensure that any committee consensus will be solidly founded on the agency's legal obligations, regulatory responsibilities and implementation capabilities.

Another witness at the Senate hearing raised a different concern about this section. He was concerned that it would prevent private entities from getting together, without agency involvement, to try to develop a consensus on a proposed rule. The bill would not preclude such private initiatives for two reasons. First, the bill is directed to actions taken by agencies, not private citizens, to develop rules. Second, Section 581 of the Act states explicitly that the bill is not intended to stop experimentation with the negotiated rulemaking process, which includes attempts by private parties to develop consensus positions on proposed rules. At the same time, the bill does impose the basic requirement that, when agencies sponsor a negotiated rulemaking committee, at least one committee member must be an agency representative.

The final provision in this section requires agencies to provide "appropriate administrative support" to their negotiated rulemaking committees, including technical assistance. The importance of this requirement has already been discussed.

SECTION 586: COMMITTEE OPERATIONS

This section provides basic rules governing the operation of a negotiated rulemaking committee.

First, the section provides the general directive that negotiated rulemaking committees "consider the matter proposed by the agency for consideration" and "attempt to reach a consensus" on a proposed rule and "any other matter the committee agrees is relevant to the proposed rule." The intent of this section is to confine the jurisdiction of the committee to the topic assigned by the agency and to direct the committee, as its primary task, to try to reach a consensus on a proposed rule.

The section is also designed to allow a committee to reach a consensus on any other issue that, in the committee's collective opinion, is relevant to its primary task. For example, a committee charged with developing a consensus on a proposed rule may fail because it cannot reach agreement on certain underlying, technical issues. In such a case, the bill authorizes the committee to try to reach a consensus on how those technical issues should be framed and what the agency should do to resolve them. A committee may also try to resolve particular regulatory issues, even if it is unable to reach agreement on an entire rule. In addition, the section authorizes a committee to address issues that may not have been anticipated when the committee was formed but which turn out to be important to resolving the broader regulatory questions. In sum, the intent of this section is to enable negotiated rulemaking committees to act with the flexibility that is the hallmark of the nego-

tiated rulemaking process; its provisions should be interpreted with that goal in mind.

Second, the section states that the agency's representatives on the committee shall participate in committee deliberations and activities "with the same rights and responsibilities as other members" and shall "be authorized to fully represent the agency." This section again stresses the obligation of agency officials to be actively engaged in the committee's work, rather than to play a passive or neutral role. The section also requires the officials to have full authority to act on behalf of the agency during the negotiations. If the reg neg process is to work, agency officials must be able to agree to or reject specific proposals, without having to obtain the consent of absent supervisors. To be able to exercise such authority, the officials will probably have to consult with other agency personnel and with other agencies; this section of the Act directs them to take the steps necessary to ensure their authority to act. While the agency head retains final authority over any rule published in the Federal Register and may, at that juncture, accept all, part or none of the consensus proposal, a premise of the negotiated rulemaking process is that the agency will make a good faith effort to use the consensus rule as the basis for the published rule. To that end, the agency's committee representatives must be empowered to participate fully and effectively in committee deliberations.

Next, the section sets out basic rules for the committee facilitator, who is charged with assisting committee deliberations and negotiations. The agency is given the first opportunity to nominate a person to hold this post. The nominee can be from either inside or outside the federal government.

The section specifically prohibits the agency's representative on substantive issues from also serving as the facilitator, because reg neg experts indicate that other participants become uncomfortable when the agency fills both roles. In fact, some reg neg experts have argued that the bill prohibit the nomination of any employee of the agency that is sponsoring the rulemaking committee. While the Committee believes that recommendation is sound advice to preserve flexibility, the section does not contain that prohibition.

After the agency has nominated a person for facilitator, the agency must ask the committee for its "consensus" approval. That means, unless the committee members have agreed to a different definition of consensus, that the interests on the committee must unanimously approve of the choice before the nominee can become the committee facilitator. If the nominee does not receive this approval, the agency can offer alternative candidates until one is approved. If the committee does not approve of any nominee offered by the agency, it can select by consensus the person it wants to serve as facilitator. The only prohibition is that the facilitator cannot also serve as the agency's representative on substantive issues. A later section of the bill also requires the agency to gauge any conflicts of interest that the nominee may have to ensure selection of a facilitator who will act with impartiality.

Once selected, the facilitator chairs the committee meetings, assists the committee deliberations, and keeps the minutes and other records that FACA requires all advisory committees to maintain. In all actions, the facilitator is required to act impartially. Because

case law has established that the Feedom of Information Act does not require agencies to release the personal notes and materials of agency officials, the subsection explicitly applies that rule to the facilitator and other members of negotiated rulemaking committees. The subsection thus clarifies how existing law applies to the reg neg process.

The next part of the section authorizes but does not require committees to adopt procedures governing their operations. This subsection allows them the flexibility to address only those procedural questions that need to be resolved. The subsection explicitly authorizes committees to adopt internal rules on an expeditious basis, outside of the formalized procedures in the APA that might otherwise apply.

The next part of the section describes the report that must be filed by every negotiated rulemaking committee at the conclusion of the committee's negotiations. It states that if the committee reaches a consensus on a proposed rule, the committee must transmit to the agency a report containing the text of that consensus rule. If the committee is unable to reach a consensus on a proposed rule, the section requires the committee to transmit to the agency a report specifying any areas in which the committee was able to reach a consensus. For example, the committee might have been able to reach a consensus on subsidiary issues or on an overall approach for the regulation, without being able to agree on all of the issues or on the entire text of the rule. The section directs such matters to be reported to the agency.

To ensure flexibility, the section permits the committee to include in its report any other information, recommendations or materials that it deems appropriate. It also authorizes any individual committee member to include as an addendum to the report any information, materials or recommendations which he or she wants the agency to consider.

Earlier versions of the bill required committees to identify and explain their areas of disagreement. That requirement was dropped on the advice of reg neg experts who indicated that it would be difficult in many instances for committee members to concur in a description of their areas of disagreement or on an explanation of why consensus was not reached. The Committee also believes that the key matter to be preserved for the record is the extent to which common ground was discovered.

Finally, the section requires the committee to turn in to its sponsoring agency the records it is required to maintain under FACA. These include minutes of committee meetings, documents considered by the committee during its deliberations, and financial records detailing committee expenditures.

SECTION 587: TERMINATION OF COMMITTEES

Section 587 provides basic rules governing the termination of a negotiated rulemaking committee.

The Act's provisions need to be understood in the context of FACA, which contains rules providing for the orderly termination of federal advisory committees. Under FACA, each advisory committee, at its inception, is required to file a charter which, among

other information, specifies the date that the committee is scheduled to terminate. When that date arrives, the committee automatically terminates unless the agency determines that the committee should continue and, prior to the scheduled termination date, renews its charter. Under FACA, a committee charter may not specify a termination date that is more than two years after the date of the charter itself.

The bill creates a different, overriding set of rules for the termination of negotiated rulemaking committees. First, the section provides this general principle: that a negotiated rulemaking committee terminates on the date that the agency promulgates a final rule on the subject that the committee was considering. This event could take place more than two years after the committee was chartered and, despite FACA, the committee would continue in existence until that final rule was promulgated. The reason is to allow agencies great flexibility in using negotiated rulemaking committees to get consensus advice at different stages of the regulatory process. For example, a committee that has given a consensus rule to the agency and, with its main task complete, has become dormant, could be asked by the agency to comment, prior to its publication, on the regulation that the agency wants to issue as its proposed or final rule. Under this section of the bill, the agency could recall the committee to duty, without having to recharter it as might otherwise be required by FACA.

Because issuing a final regulation often takes considerable time, the section's general rule on termination would appear to allow negotiated rulemaking committees to endure for long periods. However, Section 587 also contains several exceptions which can easily be used to require an earlier termination date for a particular committee. The section allows a negotiated rulemaking committee to terminate prior to the time that a final rule is promulgated if: (1) the committee's charter contains an earlier date; (2) the agency, after consulting the committee, specifies an earlier date; or (3) the committee itself specifies an earlier date.

The first exception applies if the committee's charter contains a specific termination date that is earlier than the date on which the agency promulgates the final rule. For example, the charter could provide that the committee terminates two years after it is chartered or on the date that the agency publishes in the Federal Register a *proposed* rule on the matter. In those cases, the committee would automatically terminate as provided in its charter, unless the agency specifically renews the charter prior to the specified termination date.

The second exception gives an agency wide discretion to disband a committee prior to its scheduled termination date. This discretionary power may be exercised only after the agency has consulted with committee members, and it is expected to be used with circumspection. It could be used in such situations as, for example, if unexpected budgetary constraints require the agency to terminate a regulatory effort or if a committee has reached an impasse but refuses, after months of inaction, to terminate its operations. In such cases, an agency may—after consultation with the committee—terminate the committee's operations. This authority is not, however, intended to be used as a club by the agency to force a

committee to take certain actions such as, for example, to agree to specific regulatory provisions. Use of the termination authority granted by this section in that manner would constitute an agency abuse of discretion. Barring such bad faith action, however, the agency retains final authority to terminate a negotiated rulemaking committee.

The third exception allows a committee to disband itself. This authority can be used by a committee when it has reached an impasse or when it has completed its work and its members do not wish to wait for promulgation of a final rule. This exception should be used in preference to the authority of an agency to require termination, to preserve the committee's control over its own deliberations and operations.

SECTION 588: CONCERNING CONVENORS, FACILITATORS, SERVICES AND MEMBER EXPENSES

Section 588 provides basic rules for an agency that wants to use a convenor or facilitator, accept free services, or pay the expenses of committee members.

First, Section 588(a) authorizes an agency to use either an individual or an organization to act as the convenor or facilitator in a particular negotiated rulemaking. It allows the agency to appoint someone, to hire someone through a contract, or to use the services of a government employee. These provisions are designed to afford maximum flexibility to the agency to use one of its own employees, an employee of another federal agency or someone outside the federal government.

The section requires the agency to determine whether an individual under consideration to be a convenor or facilitator has any "financial or other interest that would preclude such person from serving in an impartial and independent manner." This provision in essence requires the agency to inform itself about any possible conflicts of interest that the person under consideration may have and, if a real or apparent conflict of interest is disclosed, to determine whether that person should be used in the particular rulemaking.

The section leaves it to the agency to define the particular standards and procedures to be used in making the required conflicts of interest analysis. Requiring the person under consideration to complete a disclosure form is one obvious solution. The type of "financial interest" that might preclude participation includes, for example, whether the individual is employed by or holds stock in an entity that would be significantly affected by the regulation under consideration. The type of "other interest" that might preclude participation includes, for example, whether the person under consideration is a relative of a key party or has a history of partiality on issues of concern in the negotiation.

An agency should take careful measures to avoid using as a convenor or facilitator a person with a conflict of interest or the appearance of a conflict of interest, because employing such a person may lead to biased results or decisions that may be questioned or perceived as unfair by the affected interests. At the same time, for the sake of flexibility and the rare case where a person with a real

or apparent conflict of interest might be found acceptable, the statute does not prohibit the employment of such a person. In the case of a convenor, for example, it is possible that the agency would want to use an agency employee who has a known bias on the rule under consideration but whom the agency trusts to act impartially in determining whether reg neg is feasible and appropriate in the particular setting. In the case of a facilitator, it is possible that the agency would want to offer for committee approval a person who has a known interest but whom the committee members might trust to act impartially. In each case, the key is disclosure—that the agency, the committee and the public is informed of the possible conflict of interest. Again, however, the Committee cautions agencies against using persons with real or apparent conflicts of interest except in the rare situation where strong justifications outweigh this general principle.

Second, Section 588(b) authorizes agencies using reg neg to utilize federal and private property and services, "with or without reimbursement," so long as the owner's consent is obtained. The rule would enable an agency to use, for example, office space or computer time donated by a private concern, the services of a facilitator employed by another federal agency, and the services of a technical expert who is the employee of another agency or a private firm. Reimbursement of the costs entailed in using the property or services may be decided on a case-by-case basis.

During the markup of S. 303, the committee adopted an amendment which adds a new sentence to this part of the section. In essence, the sentence authorizes the Federal Mediation and Conciliation Service to do what it has already been doing for years—assist other federal agencies to conduct negotiated rulemakings. This explicit authorization was added at the request of the agency. It allows the Federal Mediation and Conciliation Service to furnish other agencies with convenors, facilitators, or training in negotiated rulemaking, either with or without reimbursement. The decision on whether to provide these services is left to the discretion of the Federal Mediation and Conciliation Service.

Third, Section 588(c) establishes rules on when agencies may reimburse committee members for their expenses. As explained earlier, S. 303 requires agencies using negotiated rulemaking committees to comply with FACA, except where otherwise provided. One of these exceptions involves when agencies may reimburse committee members for expenses insurred in connection with their committee activities.

Section 7(d) of FACA provides essentially the following rules on reimbursement of committee expenses: (1) it authorizes agencies to pay compensation to committee members, staffers and consultants; (2) it imposes a ceiling on the amount of compensation that may be paid to any one person; (3) it requires GSA to issue uniform guidelines on the compensation that may be paid; (4) it authorizes all committee members to be reimbursed for travel and per diem expenses under existing federal rules for such expenses; and (5) it authorizes agencies to provide services for handicapped members. Throughout, FACA permits but does not insist that agencies provide the identified assistance, leaving the final decision on the matter to each agency's discretion.

Section 588(c) takes a different approach. In essence, it states that all reg neg committee members are responsible for their own expenses, unless they meet certain requirements. To obtain agency reimbursement of expenses, a committee member must certify in writing a "a lack of adequate financial resources to participate in the committee." In addition, the agency must determine that the member's participation on the committee "is necessary to assure an adequate representation of the member's interest." Together, these requirements mean that reimbursement of expenses is available only on a case-by-case basis and only for financially strapped members whose participation is needed on the committee to ensure an "adequate representation" of the affected interests. Even for committee members who meet these eligibility requirements, the section authorizes but does not require agencies to reimburse them for their expenses.

There are several reasons that the bill takes the approach it does. As mentioned earlier, negotiated rulemakings usually cost more, initially, than conventional rulemaking procedures in which a few agency employees draft the proposed rule. Much of the cost involves setting up meetings, providing clerical and technical assistance, and making agency officials available for extended periods of time. Providing travel and per diem expenses for all committee members represents a significant expense. That is why, in most negotiated rulemakings conducted by federal agencies to date, committee members have been required to pay their own expenses. That is also why the bill does not authorize agencies to pay these expenses for all committee members.

At the same time, the bill recognizes that, for many negotiated rulemakings to function successfully, public interest groups must be able to participate. These groups, which may represent such interests as the poor, homeless and elderly, are often without sufficient funds to allow a representative to participate on a proposed committee. To assist these groups and, in so doing, make the negotiated rulemaking option a viable one, the bill authorizes agencies to reimburse expenses incurred by key committee members who are fiancially in need of assistance. By targeting agency funds to such committee members, the bill seeks to hold down costs while nevertheless ensuring that agencies are able to conduct negotiated rulemaking which require the participation of financially needy representatives.

The committee cautions agencies that it is not the intent of this section that selection of representatives for public interest groups take into account an ability to pay for a representative's expenses. In selecting a committee's membership and determining whether a particular member is eligible for finacial assistance because his or her participation is "necessary to assure an adequate representation of the member's interest," an agency should focus on the need for the interest's presence at the negotiating table and on the qualities of the interest's preferred representative; it should not rest its decisionmaking on whether a substitute representative is available who is financially self-sufficient.

The bill provides that, once a committee member is found eligible to receive agency funds, the agency may, pursuant to Section 7(d) of FACA, pay for a member's "reasonable travel and per diem

expenses, expenses to obtain technical assistance, and a reasonable rate of compensation." By referring to Section 7(d) of FACA, the bill requires agencies to comply to the extent practicable with FACA's directives, including, for example, the upper limit on compensation and the requirement that travel and per diem expenses be reimbursed according to existing federal rules.

The bill makes one other deviation from FACA in this area. It authorizes the payment of not only compensation, travel expenses and per diem expenses, as provided in Section 7(d) of FACA, but also payment of expenses incurred by a committee member to obtain needed "technical assistance" during a rulemaking negotiation. A situation in which this provision might be invoked is the case where a committee member is wary of the technical advice being provided by the agency and wants the committee to hear from another expert. In such a case, the committee member can ask the agency to reimburse it for the expenses of obtaining this advice. In this matter, as in all other instances under Section 588(c), the agency retains discretion over how much funding, if any, to provide.

Finally, Section 588(c) states that the mere fact that a committee member receives funds under this bill does not "conclusively determine" whether that person is a federal employee subject to criminal conflict of interest provisions in Title 18 of the US Code. This provision was added at the request of persons who were afraid, if they accepted funds under this Act, they would be deemed federal employees, even if they were participating in negotiations as the explicit representative of interests other than the United States. For example, a representative of environmental interests wants to be able to accept agency funds to defray expenses, without being considered a federal employee. If that person were to be deemed a federal employee, the criminal conflict of interest provisions might bar his or her participation in any matter having to do with the negotiated rule for the remainder of that person's lifetime. This is not the intended result of the bill. In short, persons who are participating in a negotiated rulemaking as representatives of interests other than the United States are not to be deemed federal employees, simply because they accept funds from an agency under this Act.

SECTION 589: ADMINISTRATIVE CONFERENCE

Section 589 provides a variety of mechanisms for federal agencies to obtain information and assistance on the negotiated rulemaking process.

First, Section 589(a) authorizes agencies to consult with the Administrative Conference of the United States (ACUS) or with other public or private individuals or organizations about reg neg issues. ACUS is cited by name because of its history of involvement in the negotiated rulemaking arena and because the bill assigns it the task of becoming a central clearinghouse of information and assistance on the topic. Other entities with expertise in negotiated rulemaking include such federal agencies as the Environmental Protection Agency and the Federal Mediation and Conciliation Service (FMCS), and such private organizations as the National Institute

for Dispute Resolution, the Conservation Foundation, the Program on Negotiation at Harvard University, the Conflict Clinic, Inc. and the Mediation Institute.

Second, Section 589(b) requires ACUS, in consultation with FMCS, to maintain a roster of individuals who are interested in serving as convenors or facilitators in negotiated rulemaking proceedings. It is the Committee's intent that this roster include individuals with a variety of experiences and strengths to ensure that agencies have a meaningful range of choices. One specific requirement is that the roster include individuals from both the public and private sectors. This roster must be made available to agencies or other individuals upon request.

The section does not require agencies to use the individuals listed on the ACUS roster. In fact, the section also explicitly allows agencies to utilize rosters maintained by other organizations and individuals. The goal of the section is not to limit to the number of persons eligible to act as convenors or facilitators, but to provide agencies with useful mechanisms to locate potentially helpful individuals.

Third, Section 589(c) authorizes ACUS to develop mechanisms which will make it easy for agencies to obtain the services of a convenor or facilitator. Reg neg experts have indicated that one impediment to an agency using a convenor or facilitator is the difficulty the agency may encounter in designing and issuing a contract or other employment document. This section asks ACUS to ease this problem by developing procedures which will allow expeditious hirings. There are a variety of procedures that ACUS could develop, including: (a) developing standard government contract language; (b) approving standard contracts drawn up by experienced mediation firms; (c) ensuring expeditious access to FMCS services; and (d) entering into standing contracts with available individuals and allowing other agencies, if they so choose, to operate through ACUS to obtain the services of those individuals. In short, the goal of this provision is to induce ACUS to study the problem, to develop standard documents and procedures, and to educate agencies on how to obtain the services they need with a minimum of confusion and red tape.

The section also makes it clear that the agency using the services of a convenor or facilitator is responsible for payment of those services, unless ACUS agrees to pay for them as explained below. Another exception would be if the services were offered without charge, as provided in Section 588(b).

Fourth, Section 589(d) requires ACUS to "compile and maintain data related to negotiated rulemaking" and to "act as a clearinghouse" for agencies and other participants looking for information on and assistance with the process. To help ACUS perform this role, the section requires agencies that engage in negotiated rulemaking to provide to ACUS the reports submitted by their reg neg committees as well as any relevant information on the agency's negotiated rulemaking experiences. ACUS is required to review and analyze these reports and any other information it obtains on agencies' use of negotiated rulemaking. Then, every two years, ACUS must submit to the Governmental Affairs Committee of the Senate and the appropriate committees of the House of Representatives a

report which includes recommendations for "effective agency use" of negotiated rulemaking and which provides an accounting of all expenditures made by ACUS to further the goals of this Act. This report should review what happened during the preceding two years, analyze any lessons learned and offer suggestions for any legislation needed. The overall goal of the biennial report should be to provide a record of information and thoughtful commentary to serve as a basis for improving federal use of the negotiated rulemaking process.

Next, Section 589(e) authorizes ACUS to provide training courses for agency personnel or other individuals on negotiated rulemaking. Possible topics include how to decide when to use the process, how to work with a convenor, how to define the regulatory issues to maximize potential for success, how to determine what interests need to be included in a committee, what administrative and budgetary issues may arise and how to resolve them, and how to work within a committee to maximize the potential for achieving consensus. ACUS is authorized to offer this training itself or through other agencies or organizations. ACUS could utilize, for example, FMCS which already sponsors reg neg training or GSA which could add reg neg to its menu of training programs for federal personnel; private organizations offer still other options. The section authorizes ACUS to offer reg neg training for federal personnel on either a reimbursable or nonreimbursable basis. Training for non-federal personnel, however, may be offered by ACUS only on a reimbursable basis.

Next, Section 589(f) authorizes ACUS, upon the request of an agency, to pay for all or some of the expenses incurred by that agency in convening and conducting a negotiated rulemaking. The primary goal of this provision is to provide a funding mechanism that will encourage agencies that have never used negotiated rulemaking to try the process. Apparently, some agencies are reluctant to try negotiated rulemaking because it is initially more expensive than standard rulemaking procedures and its overall cost savings depend upon reduced expenses in issuing a final rule. The bill will enable ACUS to reduce the up-front costs by offering to pay, for example, for a convenor or facilitator. To further ease agency reluctance, ACUS can pay to train agency employees who would be participating in the process. ACUS can also offer to pay the expenses of a committee member who would otherwise be financially unable to participate in the process and whose presence is important to the success of the venture. This last provision may be used by ACUS not only to encourage agencies to try negotiated rulemaking for the first time, but also to encourage them to try the process in novel areas—where an agency with limited resources may be otherwise reluctant to experiment.

In addition to allowing ACUS to pay for convenors, facilitators, training costs and for expenses incurred by financially strapped committee members, earlier versions of the bill allowed ACUS to pay for agencies' administrative costs. The Committee dropped this last category of expenses that could be reimbursed by ACUS, because it was felt that these expenses, for the most part, would be incurred by the agency no matter what type of rulemaking procedure was employed. The committee therefore agreed to preserve for

ACUS the costs that are more explicitly associated with an agency's trying the negotiated rulemaking process—the costs of convenors, facilitators, reg neg training, and financially strapped committee members.

The section states explicitly that ACUS is not required to pay for any reg neg costs incurred by an agency, and that ACUS has the discretion to determine the nature and amount of the payments it will make. The guiding standard to be used by ACUS in making its funding decisions is the responsibility it has been given for "furthering the use of negotiated rulemaking by Federal agencies." An accounting and justification for its funding decisions is also required to be included in the biennial report that ACUS must submit to Congress pursuant to this section.

Finally, Section 589(g), which was added at the request of ACUS, explicitly recognizes ACUS' ability to accept any donations or in-kind contributions it may receive and apply them to further the purposes of this Act. Thus, if ACUS receives a cash donation from a foundation, ACUS is free to use those funds as this Act provides—for convenors, facilitators, training, and costs incurred by eligible committee members. By including this express authorization, the bill does not mean to imply that such explicit language must be present whenever ACUS wishes to dispose of donations; the bill merely seeks to clarify the situation in the area of negotiated rulemaking.

SECTION 590: JUDICIAL REVIEW

Section 590 sets forth basic rules on the role of federal courts in the negotiated rulemaking process.

First, the section bars judicial review of actions taken by agencies to convene, participate in, and terminate a negotiated rulemaking committee. This provision allows agencies to use the negotiated rulemaking process without the delays and procedural problems that might otherwise arise if judicial review of intermediate agency actions were available.

At the same time, the section states explicitly that "[n]othing in this section shall bar judicial review of a rule which is otherwise provided by law." This provision preserves for all persons their right to challenge an agency rule that is the product of negotiated rulemaking proceedings. The APA, for example, currently authorizes a court to overturn a federal rule if it finds that the agency's action in promulgating that rule was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 USC 706(2)(A). Persons wishing to challenge a rule derived from the work of a negotiated rulemaking committee would retain all rights they presently possess under the APA to obtain judicial review of that rule.

S. 303 recognizes and maintains the long tradition in federal administrative law which authorizes judicial review of agency rules at the time those rules are promulgated. The bill merely precludes judicial intervention in the earlier stages of the regulatory process, when a negotiated rulemaking is underway. The bill precludes this judicial intervention, not to prevent courts from taking a hard look at an agency's rules, but to allow federal agencies the freedom of

action needed to make decisions and take actions which will allow the negotiated rulemaking process to work.

Finally, the section states that a court which is reviewing a rule "which is the product of negotiated rulemaking" must not give that rule "any greater deference * * * than a rule which is the product of other rulemaking procedures." This language is intended to make it clear that negotiated rules are to be treated by federal courts in the same way as other rules, with no special deference given to the method by which they were developed.

That concludes the provisions which are to appear in a new Subchapter IV in Chapter 5 of Title 5, in the U.S. Code. Paragraph (b) amends the table of contents in Chapter 5 to include the new provisions.

Section 4: Authorization of Appropriations

This section contains a 3-year authorization of appropriations for ACUS to carry out the purposes of this Act. It authorizes ACUS to receive up to $500,000 for each of the fiscal years 1990, 1991 and 1992. The purpose of these funds is to enable ACUS to carry out the tasks assigned to it by this Act: to promote use of negotiated rulemaking, gather data, act as a clearinghouse and provide certain types of reg neg funding to encourage agencies to use the process. This amount is half of what appeared in earlier versions of the bill, due to fiscal constraints. In addition, the authorization expires after 3 years, which ACUS has said is sufficient time for it to encourage federal agencies to try negotiated rulemaking.

Pursuant to 5 U.S.C. 576, ACUS currently operates under an appropriations ceiling of $2 million. S. 303 is intended to authorize funding in addition to that $2 million ceiling (rather than to allocate funds within that ceiling), because the Act assigns ACUS new administrative tasks.

Section 5: Sunset

This section provides that the Act will cease to be effective 6 years after the date of its enactment. The purpose of this sunset provision is to ensure that the Act will be reviewed at the end of that period. The section is drafted in such a way that it will allow any negotiated rulemaking underway at the time of the sunset to run its course. The decision on whether a particular negotiated rulemaking should continue to operate under the Act, after the Act's sunset, is left to the discretion of the agency which is convening or has convened those proceedings.

IV. Estimated Cost of Legislation

U.S. Congress
Congressional Budget Office,
Washington, DC, July 18, 1989.

Hon. John Glenn,
Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC

Dear Mr. Chairman: The Congressional Budget Office has prepared the attached cost estimate for S. 303, the Negotiated Rulemaking Act of 1989.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

ROBERT D. REISCHAUER,
Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 303.
2. Bill title: The Negotiated Rulemaking Act of 1989.
3. Bill status: As ordered reported by the Senate Committee on Governmental Affairs, July 13, 1989.
4. Bill purpose: S. 303 would establish procedures for negotiated rulemaking within federal agencies and clarify the authority of agencies to use such procedures. Negotiated rulemaking is a process for developing regulations through negotiations with affected parties, instead of through proposals and public comments as with conventional rulemaking. The bill would authorize the appropriation of $500,000 annually for fiscal years 1990, 1991, and 1992 to the Administrative Conference of the United States (ACUS) to establish training programs and prepare materials on negotiated rulemaking.
5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1990	1991	1992	1993	1994
Authorization level	0.5	0.5	0.5		
Estimated outlays	0.4	0.5	0.5	0.1	

The costs of this bill would be in budget function 750.

This table does not include possible budgetary savings from increased use of negotiated rulemaking, which CBO cannot estimate. The Environmental Protection Agency, for example, has indicated that negotiated rulemaking usually takes less time and involves less litigation than conventional rulemaking. Other agencies have had less experience with these procedures, but have reached similar conclusions.

Basis of estimate: This estimate assumes that the full amounts authorized would be appropriated for each fiscal year. The estimated outlays are based on historical spending patterns for the ACUS.

6. Estimated cost to State and local governments: None.
7. Estimate comparison: None.
8. Previous CBO estimate: None.
9. Estimate prepared by: Michael Sieverts.
10. Estimate approved by: C.G. Nuckols (for James L. Blum, Assistant Director for Budget Analysis.)

V. EVALUATION OF REGULATORY IMPACT

The purpose of S. 303 is to improve the federal regulatory process by establishing a procedure for conducting negotiated rulemakings. It is not anticipated that any agency will have to issue regulations to implement this Act; to the contrary, agencies are expected

to make use of the Act's guidance to avoid issuing individual regulations on the topic of negotiated rulemaking.

VI. Committee Vote

The Committee ordered the bill reported by a unanimous voice vote.

VII. Changes in Existing Law

In compliance with the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no changes are proposed is shown in roman):

TITLE 5, UNITED STATES CODE

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PART 1—THE AGENCIES GENERALLY

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CHAPTER 5—ADMINISTRATIVE PROCEDURE

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SUBCHAPTER IV—NEGOTIATED RULEMAKING PROCEDURE

Sec. 581. Purpose.
Sec. 582. Definitions.
Sec. 583. Determination of need for negotiated rulemaking committee.
Sec. 584. Publication of notice.
Sec. 585. Establishment of committee.
Sec. 586. Conduct of committee activity.
Sec. 587. Termination of committee.
Sec. 588. Services, facilities, and payment of committee member expenses.
Sec. 589. Role of the Administrative Conference of the United States.
Sec. 590. Judicial review.

Subchapter IV—Negotiated Rulemaking Procedure

§ 581. Purpose

The purpose of this subchapter is to establish a framework for the conduct of negotiated rulemaking, consistent with section 553 of this title, to encourage agencies to use the process when it enhances the informal rulemaking process. Nothing in this subchapter should be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process or with other innovative rulemaking procedures otherwise authorized by law.

§ 582. Definitions

For the purposes of this subchapter the term—

(1) "agency" has the same meaning as in section 551(1) of this title;

(2) "consensus" means unanimous concurrence among the interests represented on a negotiated rulemaking committee established under this subchapter, unless such committee—

(A) agrees to define such term to mean a general but not unanimous concurrence; or

(B) agrees upon another specified definition;

(3) "convenor" means a person who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate in a particular rulemaking;

(4) "facilitator" means a person who impartially aids in the discussions and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule;

(5) "interest" means, with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner;

(6) "party" has the same meaning as in section 551(3) of this title;

(7) "person" has the same meaning as in section 551(2) of this title;

(8) "negotiated rulemaking committee" or "committee" means an advisory committee established by an agency in accordance with this subchapter and the Federal Advisory Committee Act (5 U.S.C. App.) to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule;

(9) "rule" has the same meaning as in section 551(4) of this title; and

(10) "rulemaking" has the same meaning as in section 551(5) of this title.

§ 583. Determination of need for negotiated rulemaking committee

(a) An agency may establish a negotiated rulemaking committee to negotiate and develop a proposed rule, if the head of the agency determines that the use of the negotiated rulemaking procedure is in the public interest. In making such a determination, the head of the agency shall consider whether—

(1) there is a need for a rule;

(2) there are a limited number of identifiable interests that will be significantly affected by the rule;

(3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who—

(A) can adequately represent the interests identified under paragraph (2); and

(B) are willing to negotiate in good faith to reach a consensus on the proposed rule;

(4) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;

(5) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;

(6) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and

(7) the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.

(b)(1) An agency may use the services of a convenor to assist the agency in—

(A) identifying persons who will be significantly affected by a proposed rule; and

(B) conducting discussions with such persons to identify the issues of concern to such persons, and to ascertain whether the establishment of a negotiated rulemaking committee is feasible and appropriate in the particular rulemaking.

(2) The convenor shall report findings and may make recommendations to an agency. Upon request of the agency, the convenor shall ascertain the names of persons who are willing and qualified to represent interests that will be significantly affected by the proposed rule. The report of the convenor and any recommendations shall be made available to the public upon request.

§ 584. Publication of notice

(a) If, after considering the report of a convenor or conducting an assessment, an agency decides to establish a negotiated rulemaking committee, the agency shall publish in the Federal Register a notice which shall include—

(1) an announcement that the agency intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule;

(2) a description of the subject and scope of the rule to be developed, and the issues to be considered;

(3) a list of the interests which are likely to be significantly affected by the rule;

(4) a list of the persons proposed to represent such interests and the person or persons proposed to represent the agency;

(5) a proposed agenda and schedule for completing the work of the committee, including a target date for publication by the agency of a proposed rule for notice and comment;

(6) a description of administrative support for the committee to be provided by the agency, including technical assistance;

(7) a solicitation for comments on the proposal to establish the committee, and the proposed membership of the negotiated rulemaking committee; and

(8) an explanation of how a person may apply or nominate another person for membership on the committee, as provided under subsection (b).

(b) Persons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented by an person specified in a notice under subsection (a)(4) may apply for, or nominate another person for, membership on the negotiated rulemaking committee to represent such interests with respect to the proposed rule. Each application or nomination shall include—

(1) the name of the applicant or nominee and a description of the interests such person shall represent;

(2) evidence that the applicant or nominee is authorized to represent parties related to the interests the person proposes to represent;

(3) a written commitment that the applicant or nominee shall actively participate in good faith in the development of the rule under consideration; and

(4) the reasons that the persons specified in the notice under subsection (a)(4) do not adequately represent the interests of the person submitting the application or nomination.

§ 585. Establishment of committee

(a) The agency shall provide for a period of at least 30 calendar days for the submission of comments and applications under section 584.

(b)(1) If after considering comments and applications submitted under section 584, the agency determines that a negotiated rulemaking committee can adequately represent the interests that will be significantly affected by a proposed rule and that it is feasible and appropriate in the particular rulemaking, the agency may establish a negotiated rulemaking committee. In establishing and administering such a committee, the agency shall comply with the Federal Advisory Committee Act (5 U.S.C App.) with respect to such committee, except as otherwise provided in this subchapter.

(2) If after considering such comments and applications, the agency decides not to establish a committee, the agency shall promptly publish notice of such decision and the reasons therefor in the Federal Register.

(c) The agency shall limit membership on a negotiated rulemaking committee to 25 members, unless the agency head determines that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership. Each committee shall include at least one individual representing the agency.

(d) The agency shall provide appropriate administrative support to the negotiated rulemaking committee, including technical assistance.

§ 586. Conduct of committee activity

(a) Each negotiated rulemaking committee established under this subchapter shall consider the matter proposed by the agency for consideration and shall attempt to reach a consensus concerning a proposed rule with respect to such matter and any other matter the committee determines is relevant to the proposed rule.

(b) The person or persons representing the agency on a negotiated rulemaking committee shall participate in the deliberations and activities of such committee with the same rights and responsibilities as other members of such committee, and shall be authorized to fully represent the agency in the discussions and negotiations of the committee.

(c)(1) Notwithstanding section 10(e) of the Federal Advisory Committee Act (5 U.S.C. App.), an agency may nominate either a person from the Federal Government or a person from outside the Federal Government to serve as a facilitator for the negotiations of the committee, subject to the approval by consensus of the committee. If the committee does not approve the nominee of the agency for facilita-

tor, the agency shall submit a substitute nomination. If a committee does not approve any nominee of the agency for facilitator, the committee shall select by consensus a person to serve as facilitator. A person designated to represent the agency in substantive issues may not serve as facilitator or otherwise chair the committee.

(d) A facilitator approved or selected by a negotiated rulemaking committee shall—

(1) chair the meetings of the committee in an impartial manner;

(2) impartially assist the members of the committee in conducting discussions and negotiations; and

(3) manage the keeping of minutes and records as required under section 10 (b) and (c) of the Federal Advisory Committee Act (5 U.S.C. App.), except that any personal notes and materials of the facilitator or of the members of a committee shall not be subject to section 552 of this title.

(e) A negotiated rulemaking committee established under this subchapter may adopt procedures for the operation of the committee. No provision of section 553 of this title shall be applicable to the procedures of a committee.

(f) If a committee reaches a consensus on a proposed rule, at the conclusion of negotiations the committee shall transmit to the agency that established the committee a report containing the proposed rule. If the committee does not reach a consensus on a proposed rule, such committee shall transmit to the agency a report specifying any areas in which the committee reached a consensus. The committee may include in a report any other information, recommendations, or materials that the committee considers appropriate. Any committee member may include as an addendum to the report additional information, recommendations, or materials.

(g) In addition to the report specified by subsection (f), a committee shall submit to the agency the records required under section 10 (b) and (c) of the Federal Advisory Committee Act (5 U.S.C. App.).

§ 587. Termination of committee

A negotiated rulemaking committee shall terminate upon promulgation of the final rule under consideration, unless the committee's charter contains an earlier termination date or the agency, after consulting the committee, or the committee itself specifies an earlier termination date.

§ 588. Services, facilities, and payment of committee member expenses

(a)(1) An agency may employ or enter into contracts for the services of an individual or organization to serve as a convenor or facilitator for a committee under this subchapter, or may use the services of a government employee to act as a convenor or a facilitator for a committee.

(2) An agency shall determine whether a person under consideration to serve as convenor or facilitator of a committee under paragraph (1) has any financial or other interest that would preclude such person from serving in an impartial and independent manner.

(b) For purposes of this subchapter, an agency may use the services and facilities of other Federal agencies and public and private agen-

cies and instrumentalities with the consent of such agencies and instrumentalities, and with or without reimbursement to such agencies and instrumentalities, and may accept voluntary and uncompensated services without regard to the provisions of section 1342 of title 31. The Federal Mediation and Conciliation Service may provide services and facilities, with or without reimbursement, to assist agencies under this subchapter, including furnishing convenors, facilitators, and training in negotiated rulemaking.

(c) Members of negotiated rulemaking committee shall be responsible for their own expenses of participation in such committee, except that an agency may in accordance with section 7(d) of the Federal Advisory Committee Act (5 U.S.C. App.), pay for a member's reasonable travel and per diem expenses, expenses to obtain technical assistance, and a reasonable rate of compensation, if—

(1) such member certifies a lack of adequate financial resources to participate in the committee; and

(2) the agency determines that such member's participation in the committee is necessary to assure an adequate representation of the member's interest.

(d) A member's receipt of funds under this section or section 589 shall not conclusively determine the purposes of sections 202 through 209 of title 18 whether that member is an employee of the United States Government.

§ 589. Role of the Administrative Conference of the United States

(a) An agency may consult with the Administrative Conference of the United States or other public or private individuals or organizations for information and assistance in forming a negotiated rulemaking committee and conducting negotiations on a proposed rule.

(b) The Administrative conference of the United States, in consultation with the Federal Mediation and Conciliation Service, shall maintain a roster of individuals who have acted as or are interested in serving as convenors or facilitators in negotiated rulemaking proceedings. The roster shall include individuals from government agencies and private groups, and shall be made available upon request. Agencies may also use rosters maintained by other public or private individuals or organizations.

(c)(1) The Administrative Conference of the United States shall develop procedures which permit agencies to obtain the services of such convenors and facilitators on an expedited basis.

(2) Payment for convenor or facilitator services shall be made by the agency using the services, unless the Chairman of the Administrative Conference agrees to pay for such services under subsection (f).

(d)(1) The Administrative Conference of the United States shall compile and maintain data related to negotiated rulemaking and shall act as a clearinghouse to assist agencies and parties participating in negotiated rulemaking procedures.

(2) Each agency engaged in negotiated rulemaking shall provide to the Administrative Conference of the United States a copy of any reports submitted to the agency by negotiated rulemaking committees under section 586 and such additional information as necessary to enable the Administrative Conference of the United States to comply with this subsection.

(3) The Administrative Conference of the United States shall review and analyze the reports and information received under this subsection and shall transmit a biennial report to the Governmental Affairs Committee of the Senate and the appropriate committees of the House of Representatives that—

(A) provides recommendations for effective agency use of negotiated rulemaking; and

(B) describes the nature and amounts of expenditures made by the Administrative Conference of the United States to accomplish the purposes of this subchapter.

(e) The Administrative Conference of the United States is authorized to provide training in negotiated rulemaking techniques and procedures for Federal personnel either on a reimbursable or nonreimbursable basis. Such training may be extended to private individuals on a reimbursable basis.

(f) The Chairman of the Administrative Conference of the United States is authorized to pay, upon request of an agency, all or part of the expenses of establishing a committee and conducting a negotiated rulemaking. Such expenses may include, but are not limited to—

(1) the costs of convenors and facilitators;

(2) the expenses of committee members determined by the agency to be eligible for assistance under section 588(c); and

(3) training costs.

Determinations with respect to payments under this section shall be at the discretion of such Chairman in furthering the use of negotiated rulemaking by Federal agencies.

(g) The Administrative Conference of the United States may apply funds received under section 575(c)(12) of this title to carry out the purposes of this subchapter.

§ 590. Judicial review

Any agency action relating to establishing, assisting, or terminating a negotiated rulemaking committee under this subchapter shall not be subject to judicial review. Nothing in this section shall bar judicial review of a rule which is otherwise provided by law. A rule which is the product of negotiated rulemaking and is subjected to judicial review shall not be accorded any greater deference by a court than a rule which is the product of other rulemaking procedures.

○